No. 1092. 6/8

Brief of Putnam for Appellee

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SUPREME COURT OF THE UNITED STATES

In the matter of the petition

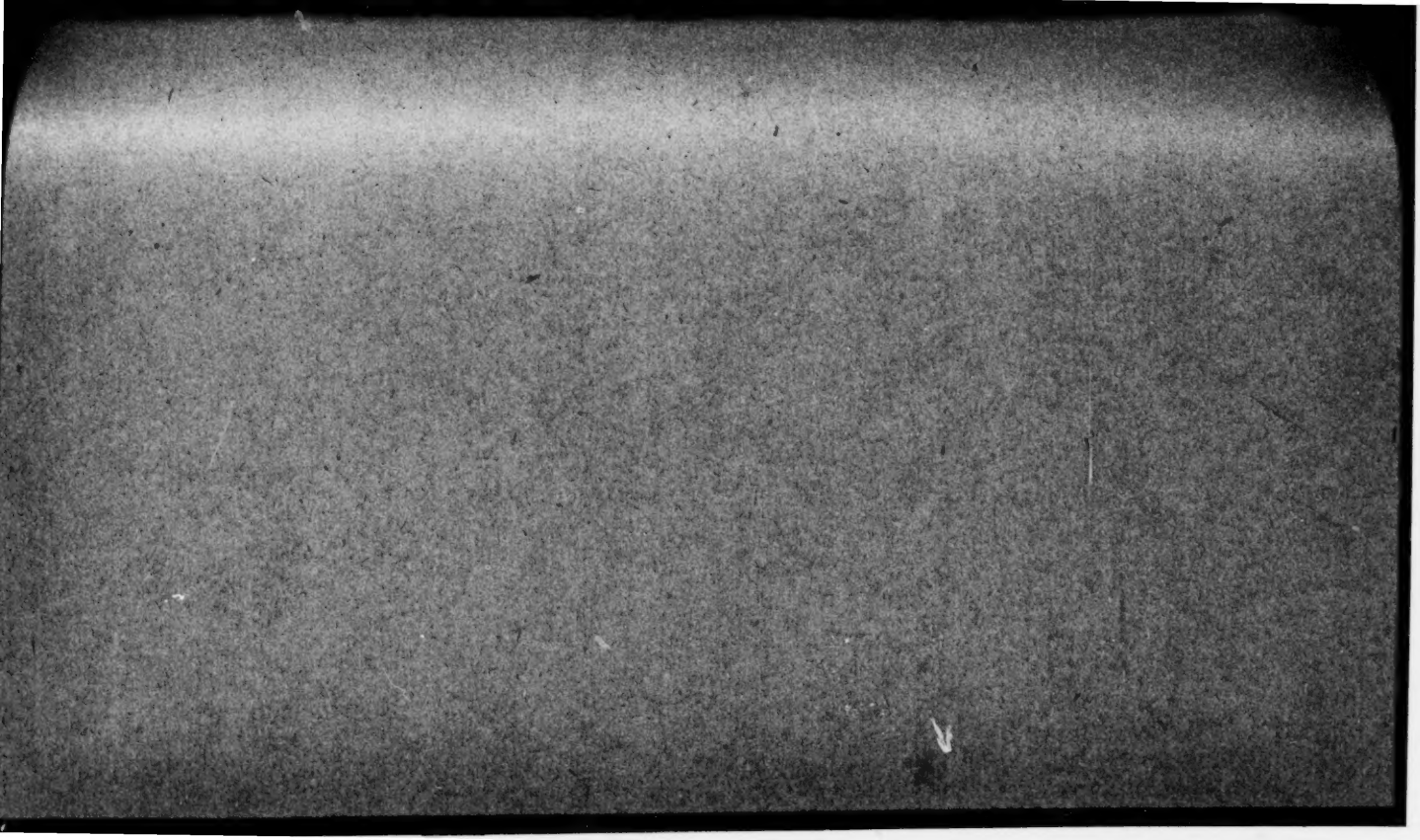
of

ROBERT W. WORKMAN for a writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

102

BRIEF FOR PETITIONER

HARRINGTON PUTNAM
Advocate



Supreme Court of the United States,

In the Matter of the petition of Robert W. Workman for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

Brief in support of the petition of libellant for a writ of certiorari.

This suit was brought in the District Court of the United States for the Southern District of New York by the libellant, as owner of the barkentine *Linda Park*, against the Mayor, Aldermen and Commonalty of the City of New York, to recover the damages suffered by said barkentine by collision with the fire-boat *New Yorker*, of which the municipality of New York was the owner.

The collision occurred on June 11th, 1893. The barkentine was lying alongside Pier 48, East river, in the City of New York, loaded and ready for sea. A fire having broken out on South street near the pier, the fire-boats *New Yorker* and *Havemeyer* were summoned by telegraph. The *Havemeyer* entered the slip in which the barkentine was lying, and began to play on the fire (Record, fols. 213–220). The *New Yorker* arriving later, entered the slip at high speed, and ran into the bow of the barkentine, causing the damage for which the libel was filed.

The negligence of the fireboat was abundantly established. The District Judge found "that the running into the *Linda Park* arose through lack of reasonable prudence, and was unnecessary and negligent" (Opinion of District Judge, fols. 521–2).

The Circuit Court of Appeals, in its decision, said: "The evidence in the record adequately supports the conclusion of the Court below, that the injuries caused to the libellant's vessel by the impact of the fireboat were caused by the negligent manner of the fireboat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libellant's vessel was moored" (Record, p. 128).

The original libel, which was against the Mayor, Aldermen, and Commonalty of the City of New York, as sole respondent (Record, p. 3), was subsequently amended so as to make the Fire Department of the City of New York, and James Gallagher, the pilot of the fireboat, parties respondent. The District Court dismissed the libel as against the Fire Department, and held the municipality and the pilot liable for the damages (Opinion of District Judge, p. 105), and on August 28th, 1894, made a decree in favor of the libellant against the Mayor, Aldermen, and Commonalty and said Gallagher for $815.84, which included interest and costs (Record, p. 115).

From this decree both the Mayor, &c., and Gallagher appealed, and on April 16, 1895, the Circuit Court of Appeals rendered its decision affirming the decision of the District Court as to Gallagher, with costs, and dismissing the libel as against the Mayor, &c., with costs of the District Court and said Circuit Court of Appeals (Opinion, p. 127).

The libellant applied to the Circuit Court of Appeals for a certification of the questions involved in the case to this Court. This application was denied on May 6th, 1895 (Decision, p. 137).

The principal question in the District Court and on appeal in the Circuit Court of Appeals was whether the Mayor, Aldermen and Commonalty of the City of New York were liable for the negligence of the fireboat. The District Court sustained the liability. The Circuit Court of Appeals held that they were not responsible.

It is respectfully submitted that the Circuit Court of Appeals erred in its decision of this question, and that a writ of *certiorari* should issue directing the return of all proceedings to this Court for review.

POINTS.

I.—The Circuit Court of Appeals erred in applying the principles of the law of master and servant to the case at bar.

In its opinion it said :

"That the suit is brought in a Court of Admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. * * * Accountability, either personally or on the principle of agency, must concur with injury to give a cause of action in any trjbunal, equally in admiralty as at common law. If the City of New York would not have been liable if one of its steam fire engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit."

In the case of the *China*, 7 Wallace, 68, this Court said :

"The maritime law as to the position and powers of the master and the responsibility of the vessel *is not derived from the civil law of master and servant, nor from the common law.* It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. * * * The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment, especially if the amount recovered were large. Thus, where the injury were greatest, there would be greatest danger of a failure of justice."

II.—As owner of the fireboat the Mayor, Aldermen and Commonalty of the City of New York must respond *in personam* for this tortious collision.

In the *Druid* (1 W. Rob., 391), cited by Mr. Justice Swayne in the *China*, Dr. Lushington said that the liability of the ship and the responsibility of the owners were convertible terms. The ship is not liable if the owners are not; and no responsibility can attach to the owners, if tthe ship is not liable to be proceeded against.

From considerations of public policy boats belonging to a municipality are not subject to arrest in a suit *in rem.*

The *Fidelity*, 9 Blatch., 572, where Chief Justice Waite said:

"As has already been seen, the public property of a municipal corporation cannot be seized on an execution, although the corporation may be sued to obtain a judgment on which an execution can issue. The simple right to sue, therefore, does not carry with it the right to seize all property. It follows necessarily that the exemption from seizure is not always the same as exemption from suit" (16 Blatchf., 572).

But in order that justice be done, the corporate owner should be answerable *in personam.* Unlike the State, the City is suable in the admiralty, and is ordinarily liable for the marine torts of all its maritime instrumentalities.

"The various decisions of the federal courts hereinbefore cited, and the reasons leading to the conclusions therein, seem to show that where a question of maritime right is presented to an Admiralty Court, that Court, at least in the absence of legislation establishing a contrary rule, may enforce said right and provide remedies for its violation in accordance with the rules of admiralty." Per Townsend, J., *Greenwood* v. *Town of Westport*, 60 Fed. Rep., 577.

In the case of *Giovanni* v. *The City of Philadelphia*, 59 Fed. Rep., 303, a municipal tug was held liable

for collision. Judge Butler in delivering his opinion said:

"The respondent further defends on the ground that the city is not responsible for the fault of the tug; that the towing of vessels is not a part of the functions imposed on the corporation, but is a public duty exercised for the benefit of the whole public, and cites §980 of 2 Dill. Mun. Corp., in support of this position. The doctrine invoked is old and well understood. It has no application, however, to the facts of this case. *We need not concern ourselves with the question whether courts of admiralty recognize it;* it is sufficient that the tug was not engaged in the discharge of a public duty such as the doctrine contemplates. but in the prosecution of a private enterprise for the respondent's profit under its direction, and in pursuance of its chartered rights. Under such circumstances it is well settled that the municipality is entitled to no immunity" (p. 304).

A municipal ice boat used to break ice in Baltimore Harbor, through the result of a miscalculation by the master, caused a collision with another vessel.

Judge Morris said in his opinion:

"It is urged that the doctrine of *respondeat superior* does not apply because it is said that this is the case of a municipal corporation in the exercise of its governmental powers performing through its officers a public service from which it derives no special benefit in its corporate capacity." * * * *

"And when in the performance of any duty, either imposed upon or assumed by it, the municipality employs maritime instrumentalities, I think it should be held answerable under the maritime law, with those exceptions only which public policy absolutely requires. If the vessel belonging to the municipality is used by it as a necessary instrument in the exercise of some municipal function, then, as was held by the Chief Justice in the case of the *Fidelity*, public policy requires that the municipality shall not be deprived of its use and therefore the maritime lien cannot attach; but to my mind no sufficient necessity or reason has been suggested for denying a remedy against the municipality as the owner of the offending vessel. * * * * * It is no argument in favor of denying the injured party his remedy *in personam* against the

owner to say that because of public convenience or necessity, he must not be allowed his lien upon the offending ship, but quite the contrary, and especially in a case in which, but for these considerations of public policy, which prevent the seizure of the ship, he would have the protection both of a privilege against the ship and the responsibility of the owner" (p. 380). The *F. C. Latrobe*, 28 Fed. Rep., 377 (1886)

It was also held by the same court in the case of Oyster Police Steamers of Maryland (31 Fed. Repr., 763), that the vessels employed by the State in governmental duties were liable for penalties for failure to have inspection of their boilers as required by the Federal law.

Considering the exemptions for cities and other political divisions of the State, which, it was claimed, relieve public vessels from the Federal law, Judge Morris said:

"The result of that rule, so applied, would, therefore, be that no penalty would be enforced for refusal to submit to inspection any of the numerous steam police boats, fire extinguishing steamers, relief boats, ice boats, and other steam vessels used by the large seaboard cities, and they would ply among the vessels in crowded ports and lie at the docks among other shipping free from supervision of any kind prescribed by congressional enactments. The question of public policy would, therefore, not be so narrow a one as might seem upon first impression" (p. 768).

III.– The decision of the State Courts as to the liability of a municipality for the negligence of officers or employees of its departments cannot bind the admiralty.

Notwithstanding the grant of admiralty jurisdiction conferred through the Constitution upon the Federal Courts to hear and determine actions for collision, it is now maintained that the Federal Courts cannot render a decree against a municipality—no matter how gross and culpable has been the mismanagement with which

the city boat has destroyed the property of innocent persons.

As is remarked by the learned District Judge:

"It is certainly a startling proposition that all the shipping of this port, foreign and domestic, should be at the mercy of the City fireboats, and liable to be negligently run down and sunk at any moment without responsibility for damages" (fol. 423).

The exception to the general rule of corporate liability by which the city has escaped answering for the faults of the *New Yorker* under the decision of the Circuit Court of Appeals is:

"That the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community in which the corporation has not private interest and from which it derives no special benefit or advantage in its corporate capacity are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from and are paid by the corporation itself. In selecting and employing them the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate power, and hence they are the agents or servants of the public at large."

Opinion, fols. 513-5.

It is no part of the public or political duties of the State to extinguish fires. Probably the first body of firemen ever organized was by mutual contribution of the Hand in Hand office, created in London in 1696. This association kept in their service for extinguishing fires thirty-five men who were clothed and wore a badge.

The London fire brigade (established in London 1833 and in 1855) was organized and maintained by the different fire insurance companies, and, although at first it had only hand engines, before 1859 it had two floating engines on the Thames.

See Harmony Fire Co. *v.* Trustees, 35 Penn. St., 500.

On the first of January, 1866, the control of the fire brigade and of other fire establishments was devolved on the Metropolitan Board of Works, 28 and 29 Vict., Ch. 70.

In our cities and towns, the earliest organizations were voluntary. On account of disorders and riotous proceedings at fires, regulations began to be made after 1840. Municipal fire departments in most Northern cities were established by legislation, which were followed by the disappearance of the old volunteer companies, and the formation of trained, uniformed, salaried bodies with the present improved steam appliances.

The fire organization of Paris was by decree of December 5, 1866. The Court of Cassation has repeatedly held the Commune answerable for damage to private property done by firemen in execution of measures to put out a fire. The Commune is held liable to make good all damage which results from the carrying out of the orders of the duly constituted authority of the Commune. In 1883 the case arose of firemen breaking into an enclosure to get water for their pumps. Their action was not ordered by the officials. The Court of Cassation, however, held that the Commune was bound to indemnify the owner for all his damage, even though the particular firemen who did the injury had come from a neighboring Commune.

Commune de Charenton *v.* Gillett, 3d January, 1883, Dalloz I., 211.

IV.—The distinction taken by the State Courts between one city department and another, is not reasonable.

To say that the cleaning of the streets is corporate and that the city is liable for the injury done by its dumping scows or other street cleaning appliances, but that it is exempt from liability for mismanage-

ment of its steam fireboats is a perversion of legal principle which this Court will never sanction.

In the case of Jones *v.* the Mersey Docks, Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports if they sustain damages by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed" (L. R., 1 H. of L., 122, 123).

The *Linda Park* and other foreign vessels entering our wharves and engaged in commerce in this port are asked by the corporation counsel to accept a still stranger distinction. The boats of the Street Cleaning Department and of the Dock Department (if there are such) are admittedly liable for their faults, but other boats, also a part of the local administration of the city, are free to run into innocent vessels with no remedy to those injured.

The distinction cannot be upheld, that municipal liability depends upon the receipt of gain by the city, thus creating a fund out of which innocent sufferers may receive compensation. While such departments may properly be compelled through the city to make recompense for wrongs suffered, the liability cannot be dependent on the earnings or emoluments of the wrong-doing branch of the municipality. No one contends that the Department of Street Cleaning is a source of revenue. The city, however, is admittedly answerable for any fault of the employees of that department on land or water. It is said as a reason that the duty of street cleaning is laid upon the city, which gives an individual a right to sue for the breach of that duty. But this distinction of corporate liability has no logical application to a maritime collision.

The liability for failure to clean streets properly or to remove garbage before a residence, may very well

depend on express legislation imposing such a duty on the municipality. But the liability for collision (being a trespass) even at common law, stands on no such distinction. This duty to refrain from running into and destroying the property of another, has its sanction in the fundamental principle that every property owner is bound "to control the use of his property, and to use it in such a manner as not to produce injury to others."

Bailey *v.* Mayor, 2 Denio, 433.

Where the individual is injured by acts of omission the inquiry may well be whether the neglected duty was imposed by statute upon the corporation; but where the act is a violent tort committed or arising from municipal propriety, the breach of duty appears *ipso facto* in the tort itself—even by the rules of the common law.

Upon this ground, it was held by the General Term of the New York Superior Court that the Metropolitan Fire Department was liable to an action for the negligent explosion of the boiler of a steam fire engine.

Clarissy *v.* Metropolitan Fire Department, 7 Abbott Pr., N. S., 352 (1869).

The duty of the municipal owner of a steamboat to navigate it so as not to collide with a private vessel alongside a wharf, is an instance which Judge Dillon calls a "duty of perfect obligation." This duty is specific, clearly defined and imperative. Even if the boat were employed in the governmental duties of the city, as contradistinguished from its corporate functions, it is not seen how the attribute of irresponsibility could cover such an invasion of private rights as a collision with a helpless vessel alongside a city wharf.

Referring to the New York cases of the Croton Dam, this Court said :

"The struggle in the New York Courts was between the dictates of that evident justice and good sense which required that the city should indemnify a suf-

ferer from the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it." Barnes *v.* District of Columbia, 91 U. S., 554.

In this opinion, the very case of a collision was referred to by the Court as an illustration of liability for property where the relation of master and servant did not strictly exist (p. 546).

See Salt Lake City *v.* Hollister, 118 U. S., 256, 262.

In a recent case, where the authorities were elaborately considered, the distinction between the state and federal jurisprudence on this subject was clearly stated:

"And it has been held in Connecticut that a municipal corporation is not liable for the negligent performance of a strictly governmental duty. *Hewison* v. *New Haven*, 37 Conn., 475; *Jewett* v. *New Haven*, 38 Conn., 368. That such exemption from liability is not in harmony with the general rule of liability in this country, nor with the decisions of the federal courts, is settled by the repeated adjudications of the Supreme Court of the United States. *Barnes* v. *District of Columbia*, 91 U. S., 540, citing *Jones* v. *New Haven*, 34 Conn., 1; *Evanston* v. *Gunn*, 99 U. S., 660; *Chicago* v. *Robbins*, 2 Black, 428; *Nebraska City* v. *Campbell*, *Id.* 590; *Weigntman* v. *Corporation of Washington*, 1 Black, 50; *City of Detroit* v. *Osborne*, 135 U. S., at page 498, 10 Sup. Ct., 1012. See also *Patton* v. *Montgomery*, 96 Ind., 131; *City of Goshen* v. *Meyers*, 119 Ind., 196, 21 N. E., 657.

Townsend, J., in *Greenwood* v. *Town of Westport*, 60 F. R., 570, 569.

The contention for exemption for damages by collision is similar to the municipal defenses heretofore interposed and overruled by the federal courts where property rights had been invaded.

In 1879 the City of New York resisted liability in the Circuit Court of the United States for this Circuit for the infringement of a patent by the Board of Education. It was stated in the opinion:

"It is argued that upon this proof the city is not

liable in this suit for two reasons—one is because these instrumentalities having charge of the schools are corporations themselves, over which the city has no control; the other is that the use is under sovereign authority delegated by the State of New York in its sovereign capacity for which the city or the Board of Education or the Department of Public Instruction can no more be held liable to suit than the State itself."

After discussing the separate incorporation of the Board of Education, the Court said:

"That the acts constituting the infringement were committed in the exercise of the authority derived from the State cannot shield the defendants from liability."

Allen *v.* The Mayor, 17 Blatchf., 350, 352.
Followed in Munson *v.* The Mayor, 3 F. R., 338.
See Gamewell Fire Alarm Co. *v.* The Mayor, 31 Fed. Rep., 312.
Also Bliss *v.* City of Brooklyn, 4 Fisher Patent Cases, 596.

No stronger instance can be cited of the political or governing agency of the State than the construction and maintainance of prisons, jails and penitentiaries. It has been held by the Federal Courts that even such an imperfect and *quasi* corporation as a county is liable to suit for infringement—although the patent was for improvement of prisons.

May *v.* Mercer Co., 30 Fed. Rep., 246.
Also 16 American Law Review, 371.

The effect of these clear expositions of the law of municipal liability is becoming apparent upon the Courts of New York. In Hill *v.* The Mayor, 139 N. Y., 495, 501, the Court unanimously said:

"But to this the city answers that what it has done has been under the authority of law; that as a municipal corporation, engaged in the performance of a public duty, upon which the public health and comfort depends, and acting by express authority of the Legis-

lature, is not liable for consequential injuries resulting to others, even though its acts would amount to a nuisance as between individuals. It cites abundant authority for the general doctrine, running from *Radcliff* v. *Mayor* (4 N. Y., 195), and *Bellinger* v. *N. Y. Cent. P. R.* (23 *Id.*,42), down to *Atwater* v. *Trustees of Canandaigua* (124 *Id.*, 602). * * "For, consider what the proposition is. It upholds a possible damage to the citizen and denies him any remedy; it infringes his normal and recognized rights with absolute impunity; it sets a nuisance at his door utterly unbearable and requires him to bear it. Surely, an authority which so results should be remarkably strong and clear. In *U. S.* v. *Fisher* (2 Cranch, 390), Chief Justice Marshall said: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to suppose a design to effect such objects." In *Coggswell* v. *N. Y., N. H. & Hart. R. R. Co.* (103 N. Y., 10), Judge Andrews said: "But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury." And in *Bohan* v. *Port Jervis Gas Light Co.* (122 N. Y., 18), the same rule was asserted. * * * "Obviously, the general doctrine which levies upon individuals forced contributions for the benefit of the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated sometimes by construing the harm inflicted into a taking of private property for which compensation must be made, and sometimes by a rigid construction of the authority claimed. *Both methods indicate a lurking doubt of the equity of the general doctrine, and a disposition to narrow the field of its operation.*"

By the English common law there was no remedy for damage incidentally done in extinguishing fire. The loss remained where it fell (Bowditch *v.* Boston, 101 U. S., 16). . In the admiralty, if one interest is sacrificed to avert a fire loss to others in the same common interest, a right of contribution in general average is recognized (Heye *v.* the North German Lloyd, 36 F. R., 705). So also in case of extraordinary efforts

to put out fire, the admiralty allows salvage reward, while at common law there is no compensation, however meritorious the service. It is also intimated by the common law courts, that a private individual is not liable for damage caused by his want of care in efforts to put out a fire. In the Admiralty, however, there is a liability for omitting ordinary precautions. Thus a tug, attempting to tow a burning vessel out into the stream, was held liable for using a hempen hawser instead of a chain.

The *Clarita*, 23 Wallace, 1.

V.—A grave question of constitutional law is also presented—whether it is competent for the State of New York by its legislation to authorize a city to maintain and navigate a steam vessel, free from any of the liabilities of vessel owners.

The whole question of extending the immunity of cities to navigation of vessels is now unsettled. By courtesy the lien *in rem* is not enforced by the Courts of Admiralty, since the issue of process is deemed an improper interference with the orderly municipal administration.

Under this decision of the Circuit Court of Appeals, the vessel or property injured by the faulty navigation of a city fire-boat has no redress.

The Department of Education of New York is also held by the State Courts to be political and governmental, as distinguished from corporate, and, therefore, that the city is not liable for the tortious acts of its employees in that department.

Among the educational instrumentalities of New York City is the Schoolship *St. Marys*—a training ship which engages in the long summer cruises in the Atlantic. Suppose this city ship should negligently collide with an innocent vessel. Could it be claimed in this Court, that the liability both *in rem* and *in personam* was taken away by the legislation and de-

cisions of the State of New York, that the Federal Admiralty Courts were powerless to afford any relief?

The fact that the collision in the case at bar occurred within the territorial limits of the City of New York does not affect the question. The *Linda Park* at the time was engaged in foreign commerce. She was run into while on navigable waters within the admiralty jurisdiction. A city or town has no logical attribute of irresponsibility. It is liable for the usual consequence of ownership, and this liability may be enforced by the courts.

How can the position be sustained that the corporate owner of a steam vessel, if navigated contrary to law, is exempt from liability? Surely if the State of New York can exempt a municipal shipowner, it could also exempt any private corporation, and could thus authorize a species of irresponsible vessel ownership, which in other countries is jealously limited to the public armed vessels of foreign sovereignties.

VI.—The doctrine of municipal irresponsibility has grown up under the common law, and local statutes.

Even in common law actions, this Court has declared and uniformly held to a stricter rule of liability than the courts of the State of New York. It has also held firmly to the principle that every ship-owner should so use his property as not injure another. The admiralty law of this Court is "Fault creates liability." If the only redress is a suit *in personam*, then the owner must respond to the value of his *res*.

Suppose the offending vessels were actually seized under judicial process, the *China* case is a direct authority deciding that the liability of the owner does not depend on agency, or the relation of master and servant, but is a responsibility incidental to ownership.

Obviously this liability does no turn on the form of process. The proceeding *in rem* does not create the liability, but is only a convenient mode of obtaining security.

It would lead to strange and unjust results to hold that it was necessary to have a seizure *in rem*, in order to apply the doctrine of the maritime law. Suppose for example that the delinquent vessel escapes from the jurisdiction without actual arrest, could it then be maintained that the maritime liability of the owner was thereby displaced, and that a recovery could only be had against the owner under the common law rules of agency, which would result in his escaping liability unless he actually appointed the pilot ?

VII.—A serious international question is involved. The owner of the *Linda Park*, a British subject engaged in lawful commerce with this country, is fairly entitled to the decision of this Court. To require him to submit to the decision of the Circuit Court of Appeals is in effect a denial of justice, which exposes our jurisprudence to a reproach, when it is born in mind that in Great Britain foreign ship-owners, including those of our own country, are permitted to carry their controversies to the highest court.

To grant the application would give the petitioner that relief to which the admitted hardship of his case should entitle him, and enable this Court to settle definitely the serious questions arising from municipal ownership of vessels, and to decide whether or not such ownership is virtually irresponsible, as is now held by the Circuit Court of Appeals.

VIII.—The writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit should be granted.

HARRINGTON PUTNAM
Advocate for Petitioner

May 18, 1895

No. 276. 42 A S 1

Brief of Putnam & Burling
for Appellee

Filed Apr. 10, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895

Office Supreme Court,
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JAMES H. McKENNEY
Clerk

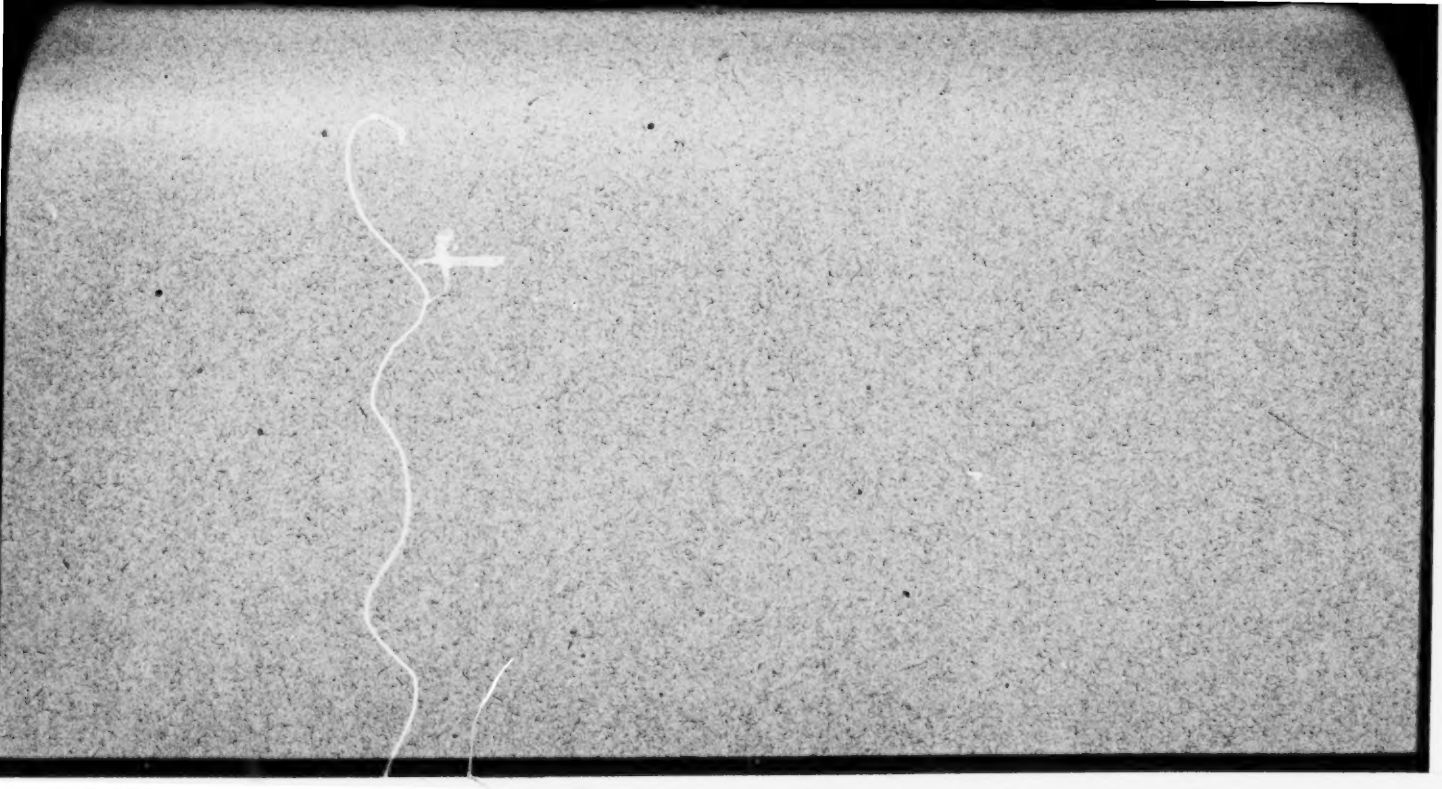
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER,
Appellants,
vs.
ROBERT W. WORKMAN,
Libellant-Appellee.

No. 276

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE LIBELLANT

COWEN, WING, PUTNAM & BURLINGHAM
Proctors for Libellant



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OCTOBER TERM, 1896.

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Appellants,
vs.
ROBERT W. WORKMAN,
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No. 276.

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Brief for Workman, libellant.

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The collision occurred on June 11th, 1893. The barkentine was lying alongside Pier 48, East river, in the City of New York, loaded and ready for sea. A fire having broken out on South street near the pier, the fire-boats *New Yorker* and *Havemeyer* were summoned by telegraph. The *Havemeyer* entered the slip in which the barkentine was lying, and began to play on the fire. The *New Yorker*, arriving later, entered the slip at high speed, and ran into the bow of the barkentine, causing the damage for which the libel was filed.

The negligence of the fireboat was abundantly established. The District Judge found "that the running

into the *Linda Park* arose through lack of reasonable prudence, and was unnecessary and negligent" (Opinion of District Judge, page 76).

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The libellant applied to the Circuit Court of Appeals for a certification of the questions involved in the case to this Court. This application was denied on May 6th, 1895 (Decision, p. 94).

Application was thereupon made by the libellant to this Court for a writ of certiorari, which was granted on May 28th, 1895 (Record, p. 95).

"The case presents the legal question whether the municipal corporation, the Mayor, etc., of the City of

New York, is responsible for the negligence of the members of its fire department committed while attempting to extinguish a fire within the corporate limits."

Opinion of Circuit Court of Appeals, p. 89.

A recently compiled list of the steam fire-boats owned and employed by the cities of the United States is also annexed (A p. 23), showing a fleet of twenty four vessels. These obviously do not include the larger number of municipal boats for police, docks, street cleaning, ice breaking, dredging, and for the departments of charities and correction. By reason of the large commercial interests along the water fronts the tendency is to equip city fire boats with great propelling power, so that they may be driven at a high speed to the place where their services are required.

In view of the possible damage to other vessels from such a fleet, plying in crowded harbors, the learned District Judge, Honorable Addison Brown, said:

"It is certainly a startling proposition that all the shipping of this port, foreign and domestic, should be at the mercy of the city fire boats and liable to be negligently run down and sunk at any moment without responsibility for damages." (*Record*, p. 76,)

The provisions of the charter of the City of New York creating that corporation, including those relating to the Fire Department, are printed in the appendix. (B p. 24.)

POINTS

I.—The responsibility of the municipality should be determined, not by the municipal law of master and servant, but by the principles of the maritime law.

Both the District Court and the Circuit Court of Appeals sought to apply to a case of collision on navigable waters the municipal law of the State of New

York. Although they came to different conclusions, the District Court holding the city liable and the Circuit Court of Appeals holding it not liable, both Courts approached the question by the same road. The question with each was the same—Is the extinction of fires a governmental or a corporate function? Judge Brown, after a very careful examination of the New York decisions, concluded that in putting out fires the City of New York was exercising a corporate function. The Circuit Court of Appeals held that "the duties of municipal corporations in respect to protecting its citizens from the dangers of fire are governmental, and not corporate," and accordingly held the city not liable.

In his opinion Judge Wallace said:

"That the suit is brought in a court of admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. * * * Accountability, either personally or on the principle of agency, must concur with injury to give a cause of action in any tribunal, equally in admiralty as at common law. If the City of New York would not have been liable if one of its steam fire engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit."

Record, p. 89.

In the case of the *China*, 7 Wallace, 68, this Court said:

"The maritime law as to the position and powers of the master and the responsibility of the vessel *is not derived from the civil law of master and servant, nor from the common law.* It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. * * * The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment, especially if the

amount recovered were large. Thus, where the injury were greatest, there would be greatest danger of a failure of justice."

Marsden in his work on Collisions attacks this doctrine (3rd ed., pp. 75–6) and claims that "at the present day it would not be followed." But he says (p. 77) that

"The doctrine which, treating the ship as the wrongdoer, makes her liable in Admiralty under all circumstances, and without regard to her ownership, has been carried further in the American Courts than is consistent with the English decisions. See per Story, J., United States *v. The Malek Adhel*, 2 How., 210,233."

Marsden on Collisions, p. 77, Note a.

Again he says:

"In America, the liability of the ship, as distinguished from the personal liability of the owner, has been carried further than it has ever been carried by the Courts of this country. In a case before the Supreme Court (*The Malek Adhel, supra*) Story, J., quoted with approval the following passages from a judgment of Marshall, C. J.: 'This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel.' And again, quoting from another case, he says: 'The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing.' This, it will be observed, is not the view taken by the Courts of this country."

Marsden, pp. 93–4.

However, the most recent British maritime authority declares the full liability of the offending vessel for damage by collision. In Currie *v.* McKnight, 1897, A. C., 97,106, Lord Watson, delivering the judgment of the House of Lords, said:

"The great increase which has taken place in the number of sea-going ships propelled by steam power at high rate of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become

highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And in my opinion it is a reasonable and salutary rule, that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy *against the corpus of the offending ship* and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation."

II.—By the law of the Admiralty a lien in favor of the party injured follows a tortious collision.

In the *Arturo*, 6 Fed. Rep., 313, Judge Lowell said:

"If a ship in command of a pilot whom it was compelled to take, injures another ship through fault of the pilot, the ship is liable, unless exonerated by statute. If charterers are owners for the voyage, and appoint the master and crew, the ship is liable. If she were navigated by pirates, who had run away with her, she would, in my opinion, be responsible to the injured ship."

In the case of Ralli *v.* Troop, 157 U. S., 403, the *China* case is thus explained:

"That decision proceeded not upon any authority or agency of the pilot derived from the civil law of master and servant, or from the common law as the representative of the owners of the ship and cargo, nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel *in whosesoever hands she lawfully is*, is herself considered as the wrong-doer, liable for the tort and subject to a maritime lien for the damages."

This doctrine applies to all vessels, public and private.

In the case of the *Siren* (7 Wall., 152), this Court, speaking by Mr. Justice Field, said:

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in

favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."

In this case the steamship *Siren* had been captured by the steamship *Gladiolus* while attempting to break the blockade at Charleston, S. C., and was placed in the charge of a prize crew and ordered to Boston. She put into the port of New York for coal, and on her voyage through Hell Gate sank the schooner *Harper*. She was condemned as prize by the U. S. District Court of Massachusetts. The owners of the *Harper* intervened by petition, but the District Court rejected their claim. It was contended that, the vessel being in charge of a prize crew, the doctrine of master and servant did not control, since the Government is never held to respond for the acts of its servants. The Supreme Court reversed the decision of the District Court and held the *Siren* liable for the collision.

Unlike the Federal Government or the State, the City is suable in the admiralty, and is ordinarily liable for the marine torts of all its maritime instrumentalities.

Shields v. *Mayor*, 18 Fed. Rep., 748.

Nevertheless, from considerations of public policy, which make it unseemly and improper to arrest a city vessel which at the time is in municipal employ, the courts will not enforce the lien on the *res*.

In the case of the *Fidelity*, a police boat belonging to the City of New York, the District Court said :

"The question is one of public policy, and the principle involved is that to permit seizure of the tug in this case would endanger the performance of the public duties of the government of the municipality. A lien may exist, and the Court where it has control of the *res* in a proper manner may enforce the lien upon

it; but it will not enforce the lien on the *res* where, in order to obtain such control and sustain the proceeding, the possession of the governmental authority must be invaded under the process of the Court" (9 Ben., 335).

In the same case on appeal Chief Justice Waite said:

"As has already been seen, the public property of a municipal corporation cannot be seized on an execution, although the corporation may be sued to obtain a judgment on which an execution can issue. The simple right to sue, therefore, does not carry with it the right to seize all property. It follows necessarily that the exemption from seizure is not always the same as exemption from suit" (16 Blatchf., 572).

This exemption from actual arrest requires, in order that justice be done, that the corporate owner should be answerable *in personam*.

In the case of Guthrie *v.* City of Philadelphia, 73 F. R., 688, the District Judge said:

'The boat was liable to seizure on the lien arising from her fault and the owner's liability *in admiralty* is a necessary consequence."

III.– The decisions of the State Courts as to the liability of a municipality for the negligence of officers or employees of its departments cannot bind the admiralty.

In the case of *Greenwood* v. *Town of Westport*, 60 Fed. Rep., 577, Judge Townsend of Connecticut said:

"The various decisions of the federal courts hereinbefore cited, and the reasons leading to the conclusions therein, seem to show that where a question of maritime right is presented to an Admiralty Court, that Court, at least in the absence of legislation establishing a contrary rule, may enforce said right and provide remedies for its violation in accordance with the rules of admiralty."

In the case of *Giovanni* v. *The City of Philadelphia*, 59 Fed. Rep., 303, a municipal tug was held liable

for collision. Judge Butler in delivering his opinion said:

"The respondent further defends on the ground that the city is not responsible for the fault of the tug; that the towing of vessels is not a part of the functions imposed on the corporation, but is a public duty exercised for the benefit of the whole public, and cites §980 of 2 Dill. Mun. Corp., in support of this position. The doctrine invoked is old and well understood. It has no application, however, to the facts of this case. *We need not concern ourselves with the question whether courts of admiralty recognize it;* it is sufficient that the tug was not engaged in the discharge of a public duty such as the doctrine contemplates, but in the prosecution of a private enterprise for the respondent's profit under its direction, and in pursuance of its chartered rights. Under such circumstances it is well settled that the municipality is entitled to no immunity" (p. 304). Affirmed 62 F. R., 617.

A municipal ice boat used to break ice in the harbor of Baltimore, through the result of a miscalculation by the master, caused a collision with another vessel.

Judge Morris said in his opinion:

"It is urged that the doctrine of *respondeat superior* does not apply because it is said that this is the case of a municipal corporation in the exercise of its governmental powers performing through its officers a public service from which it derives no special benefit in its corporate capacity." * * * *

"And when in the performance of any duty, either imposed upon or assumed by it, the municipality employs maritime instrumentalities, I think it should be held answerable under the maritime law, with those exceptions only which public policy absolutely requires. If the vessel belonging to the municipality is used by it as a necessary instrument in the exercise of some municipal function, then, as was held by the Chief Justice in the case of the *Fidelity*, public policy requires that the municipality shall not be deprived of its use and therefore the maritime lien cannot attach; but to my mind no sufficient necessity or reason has been suggested for denying a remedy against the municipality as the owner of the offending vessel. * * *

* * It is no argument in favor of denying the injured party his remedy *in personam* against the

owner to say that because of public convenience or necessity, he must not be allowed his lien upon the offending ship, but quite the contrary, and especially in a case in which, but for these considerations of public policy, which prevent the seizure of the ship, he would have the protection both of a privilege against the ship and the responsibility of the owner" (p. 380).

The *F. C. Latrobe*, 28 Fed. Rep., 377 (1886)

It was also held by the same court in the case of Oyster Police Steamers of Maryland (31 Fed. Rep., 763), that the vessels employed by the State in governmental duties were liable for penalties for failure to have inspection of their boilers as required by the Federal law.

Considering the exemptions for cities and other political divisions of the State, which, it was claimed, relieve public vessels from the Federal law, Judge Morris said:

"The result of that rule, so applied, would, therefore, be that no penalty would be enforced for refusal to submit to inspection any of the numerous steam police boats, fire extinguishing steamers, relief boats, ice boats, and other steam vessels used by the large seaboard cities, and they would ply among the vessels in crowded ports and lie at the docks among other shipping free from supervision of any kind prescribed by congressional enactments. The question of public policy would, therefore, not be so narrow a one as might seem upon first impression" (p. 768).

See also Guthrie *v.* City of Philadelphia, 73 F. R., 688 (1896).

Notwithstanding the grant of admiralty jurisdiction conferred by the Constitution upon the Federal Courts to hear and determine actions for collision, the Circuit Court of Appeals holds that the Federal Courts cannot render a decree against a municipality—no matter how gross and culpable has been the mismanagement by which the city boat has destroyed the property of innocent persons.

The exception to the general rule of corporate liability by which the city has escaped answering for the

faults of the *New Yorker* under the decision of the Circuit Court of Appeals is:

"That the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from and are paid by the corporation itself. In selecting and employing them the municipality merely performs a political or governmental function; the duties entrusted to them do not relate to the exercise of corporate powers, and hence they are the agents or servants of the public at large."

Opinion, pp. 89–90.

But it is no part of the public or political duties of the State to extinguish fires.

As the learned District Judge said:

"The work of the fire department is not in the least of a general governmental nature, enforced in some form throughout the State for the benefit of the public at large. The extinction of fires is not, and never has been a State function. It has always been done either by volunteer companies, or by such special local organizations as have been formed and authorized to perform this service; or else by local municipalities or boards similarly authorized in particular localities."

Opinion of Judge Brown, p. 80.

Probably the first body of firemen ever organized was by mutual contribution of the Hand in Hand office, created in London in 1696. This association kept in their service for extinguishing fires thirty-five men who were clothed and wore a badge.

The London fire brigade (established in London 1833 and in 1855) was organized and maintained by the different fire insurance companies, and, although at first it had only hand engines, before 1859 it had two floating engines on the Thames.

See Harmony Fire Co. *v.* Trustees, 35 Penn. St., 500.

On the first of January, 1866, the control of the fire brigade and of other fire establishments was devolved on the Metropolitan Board of Works, 28 and 29 Vict., Ch. 70.

The fire organization of Paris was by decree of December 5, 1866. The Court of Cassation has repeatedly held the Commune answerable for damage to private property done by firemen in execution of measures to put out a fire. The Commune is held liable to make good all damage which results from the carrying out of the orders of the duly constituted authority of the Commune. In 1883 a case arose in which firemen broke into an enclosure to get water for their pumps. Their action was not ordered by the officials. The Court of Cassation, however, held that the Commune was bound to indemnify the owner for all his damage, even though the particular firemen who did the injury had come from a neighboring Commune.

> Commune de Charenton *v.* Gillett, 3d January, 1883, Dalloz I., 211. See Appendix C, p. 30.

In our cities and towns, the earliest organizations were voluntary. On account of disorders and riotous proceedings at fires, regulations began to be made after 1840. Municipal fire departments in most Northern cities were established by legislation, and the old volunteer companies disappeared and were succeeded by bodies of trained, uniformed, salaried men with the present improved steam appliances.

IV.—The distinction taken by the State Courts between one city department and another is not reasonable when applied to vessels engaged in navigation.

Contrary to the decisions of Massachusetts and the Courts of several other States, this Court has always held municipal corporations to a strict liability for

breach of their duty as to streets, sidewalks, bridges and wharves.

Providence *v.* Clapp, 17 Howard, 161.
Richardson *v.* Boston, 19 Howard, 263.
Wrightman *v.* Washington, 1 Black, 39.
Chicago *v.* Robbins, 2 Black, 418.
Nebraska *v.* Campbell, 2 Black, 590.
Mayor *v.* Sheffield, 4 Wall., 189.
Barnes *v.* District of Columbia, 91 U. S., 540.
Cleveland *v.* King, 132 U. S., 303.
District of Columbia *v.* Woodbury, 136 U. S., 450.
Washington Gas Light Co. *v.* District of Columbia, 161 U. S., 316.

Respecting the liability for defective sidewalks, this Court, however, in one notable instance followed the law of Michigan, and decided that an individual could not maintain an action for damages against the city of Detroit where such a right of action was not given by the local law. Mr. Justice Brewer said:

"The question presented by it is *not one of general commercial law*, it is purely local in its significance and extent."

Detroit *v.* Osborne, 135 U. S., 492, 498.

As to maritime collisions cognizable in the admiralty the federal grant in the Constitution is especially designed to make the resulting rights and liabilities general and national, and not dependent on the law of a particular port. The owner of a vessel navigating within the admiralty jurisdiction is bound to the same liability in the Admiralty Courts whether his vessel be carrying sweepings from the streets or pumps to a fire. All steam vessels alike are subject to the statutes of Congress, irrespective of the branch or department of the city to which they are applied.

To say that the cleaning of the streets is corporate and that the city is liable for the injury done by its dumping scows or other vessels navigating under the department of streets, but that it is exempt from liabil-

ity for mismanagement of its steam fireboats is a perversion of legal principle which this Court will never sanction.

In the case of Jones *v.* the Mersey Docks, Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports if they sustain damages by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed" (L. R., 1 H. of L., 122, 123).

The *Linda Park* and other foreign vessels entering our wharves and engaged in commerce in this port must, under the decision of the Circuit Court of Appeals, accept a still stranger distinction. The boats of the Street Cleaning Department and of the Dock Department (if there are such) are admittedly liable for their faults, but other boats, also a part of the local administration of the city, are free to run into innocent vessels with no remedy to those injured.

The distinction cannot be upheld, that municipal liability depends upon the receipt of gain by the city, thus creating a fund out of which innocent sufferers may receive compensation. While such departments may properly be compelled through the city to make recompense for wrongs suffered, the liability cannot be dependent on the earnings or emoluments of the wrongdoing branch of the municipality. No one contends that the Department of Street Cleaning is a source of revenue. The city, however, is admittedly answerable for any fault of the employees of that department on land or water. The reason given is that the duty of street cleaning is laid upon the city, which gives an individual a right to sue for the breach of that duty. But this distinction of corporate liability has no logical application to a maritime collision.

The liability for failure to clean streets properly or to remove garbage before a residence, may very well

depend on express legislation imposing such a duty on the municipality. But the liability for collision (being a trespass) even at common law, stands on no such distinction. This duty to refrain from running into and destroying the property of another, has its sanction in the fundamental principle that every property owner is bound "to control the use of his property, and to use it in such a manner as not to produce injury to others."

Bailey *v.* Mayor, 2 Denio, 433.

Where the individual is injured by acts of omission the inquiry may well be whether the neglected duty was imposed by statute upon the corporation; but where the act is a violent tort committed or arising from municipal property, the breach of duty appears *ipso facto* in the tort itself—even by the rules of the common law.

Upon this ground, it was held by the General Term of the New York Superior Court that the Metropolitan Fire Department was liable to an action for the negligent explosion of the boiler of a steam fire engine.

Clarissy *v.* Metropolitan Fire Department, 7 Abbott Pr., N. S., 352 (1869).

The duty of the municipal owner of a steamboat to navigate it so as not to collide with a private vessel alongside a wharf, is an instance which Judge Dillon calls a "duty of perfect obligation." This duty is specific, clearly defined and imperative. Even if the boat were employed in the governmental duties of the city, as contradistinguished from its corporate functions, it is not seen how the attribute of irresponsibility could cover such an invasion of private rights as a collision with a helpless vessel alongside a city wharf.

Referring to the New York cases of the Croton Dam, this Court said :

"The struggle in the New York Courts was between the dictates of that evident justice and good sense which required that the city should indemnify a suf-

ferer from the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it." Barnes *v.* District of Columbia, 91 U. S., 554.

In this opinion, the very case of a collision was referred to by the Court as an illustration of liability for property where the relation of master and servant did not strictly exist (p. 546).

See Salt Lake City *v.* Hollister, 118 U. S., 256, 262.

In a recent case, where the authorities were elaborately considered, the distinction between the state and federal jurisprudence on this subject was clearly stated:

"And it has been held in Connecticut that a municipal corporation is not liable for the negligent performance of a strictly governmental duty. *Hewison* v. *New Haven*, 37 Conn., 475; *Jewett* v. *New Haven*, 38 Conn., 368. That such exemption from liability is not in harmony with the general rule of liability in this country, nor with the decisions of the federal courts, is settled by the repeated adjudications of the Supreme Court of the United States. *Barnes* v. *District of Columbia*, 91 U. S., 540, citing *Jones* v. *New Haven*, 34 Conn., 1; *Evanston* v. *Gunn*, 99 U. S., 660; *Chicago* v. *Robbins*, 2 Black, 428; *Nebraska City* v. *Campbell*, *Id.* 590; *Weightman* v. *Corporation of Washington*, 1 Black, 50; *City of Detroit* v. *Osborne*, 135 U. S., at page 498, 10 Sup. Ct., 1012. See also *Patton* v. *Montgomery*, 96 Ind., 131; *City of Goshen* v. *Meyers*, 119 Ind., 196, 21 N. E., 657.

Townsend, J., in *Greenwood* v. *Town of Westport*, 60 F. R., 570, 569.

The contention for exemption for damages by collision is similar to the municipal defenses heretofore interposed and overruled by the federal courts where property rights had been invaded.

In 1879 the City of New York resisted liability in the Circuit Court of the United States for this Circuit for the infringement of a patent by the Board of Education. It was stated in the opinion:

"It is argued that upon this proof the city is not liable in this suit for two reasons—one is because these instrumentalities having charge of the schools are corporations themselves, over which the city has no control; the other is that the use is under sovereign authority delegated by the State of New York in its sovereign capacity for which the city or the Board of Education or the Department of Public Instruction can no more be held liable to suit than the State itself."

After discussing the separate incorporation of the Board of Education, the Court said:

"That the acts constituting the infringement were committed in the exercise of the authority derived from the State cannot shield the defendants from liability."

Allen *v.* The Mayor, 17 Blatchf., 350, 352.
Followed in Munson *v.* The Mayor, 3 F. R., 338.
See Gamewell Fire Alarm Co. *v.* The Mayor, 31 Fed. Rep., 312.
Also Bliss *v.* City of Brooklyn, 4 Fisher Patent Cases, 596.

No stronger instance can be cited of the political or governing agency of the State than the construction and maintenance of prisons, jails and penitentiaries. It has been held by the Federal Courts that even such an imperfect and *quasi* corporation as a county is liable to suit for infringement—although the patent was for improvement of prisons.

May *v.* Mercer Co., 30 Fed. Rep., 246.
Also 16 American Law Review, 371.

The effect of these clear expositions of the law of municipal liability is becoming apparent upon the Courts of New York. In Hill *v.* The Mayor, 139 N. Y., 495, 501, the Court unanimously said:

"But to this the city answers that what it has done has been under the authority of law; that as a municipal corporation, engaged in the performance of a public duty, upon which the public health and comfort de-

pends, and acting by express authority of the Legislature, is not liable for consequential injuries resulting to others, even though its acts would amount to a nuisance as between individuals. It cites abundant authority for the general doctrine, running from *Radcliffe* v. *Mayor* (4 N. Y., 195), and *Bellinger* v. *N. Y. Cent. P. R.* (23 *Id.*,42), down to *Atwater* v. *Trustees of Canandaigua* (124 *Id.*, 602). * * "For, consider what the proposition is. It upholds a possible damage to the citizen and denies him any remedy; it infringes his normal and recognized rights with absolute impunity; it sets a nuisance at his door utterly unbearable and requires him to bear it. Surely, an authority which so results should be remarkably strong and clear. In *U. S.* v. *Fisher* (2 Cranch, 390), Chief Justice Marshall said: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to suppose a design to effect such objects." In *Coggswell* v. *N. Y., N. H. & Hart. R. R. Co.* (103 N. Y., 10), Judge Andrews said: "But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury." And in *Bohan* v. *Port Jervis Gas Light Co.* (122 N. Y., 18), the same rule was asserted. * * * "Obviously, the general doctrine which levies upon individuals forced contributions for the benefit of the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated sometimes by construing the harm inflicted into a taking of private property for which compensation must be made, and sometimes by a rigid construction of the authority claimed. *Both methods indicate a lurking doubt of the equity of the general doctrine, and a disposition to narrow the field of its operation.*"

In the latest book which treats the question of the liability of municipalities for torts (Goodnow's Municipal Home Rule, Macmillan Company, 1895), it is said:

"In all these cases" (wharves, water and gasworks, markets and washhouses) "its liability may be based on one of two grounds, viz., that it is managing property, or that the work which is being attended to by

it and in whose management the damage has been done is of local and not general interest, * * * but in almost all cases where municipal corporations have been held liable for tort, with the exception of negligence in the care of streets, the duty whose negligent performance has caused the damage has, as a matter of fact, been performed in connection with municipal property, and, as will be pointed out, *negligence in the management of property of whatever nature is more and more being regarded as a basis for a liability for damages.*"

P. 141-2.

By the English common law there was no remedy for damage incidentally done in extinguishing fire. The loss remained where it fell (Bowditch *v.* Boston, 101 U. S., 16). In case of extraordinary efforts to put out fire, the admiralty allows salvage reward, while at common law there is no compensation, however meritorious the service. It is also intimated by the common law courts, that a private individual is not liable for damage caused by his want of care in efforts to put out a fire. In the Admiralty, however, there is a liability for omitting ordinary precautions. Thus a tug, attempting to tow a burning vessel out into the stream, was held liable for using a hempen hawser instead of a chain.

The *Clarita*, 23 Wallace, 1.

The whole question of extending the immunity of cities to navigation of vessels is now unsettled. By courtesy the lien *in rem* is not enforced by the Courts of Admiralty, since the issue of process is deemed an improper interference with the orderly municipal administration.

Under this decision of the Circuit Court of Appeals, the vessel or property injured by the faulty navigation of a city fire-boat has no redress.

The Department of Education of New York is also held by the State Courts to be political and governmental, as distinguished from corporate, and, therefore, the city is not liable for the tortious acts of its employees in that department.

Among the educational instrumentalities of New York City is the Schoolship *St. Marys*—a training ship which takes long summer cruises in the Atlantic. Suppose this city ship should negligently collide with an innocent vessel. Could it be claimed in this Court, that the liability both *in rem* and *in personam* was taken away by the legislation and decisions of the State of New York, that the Federal Admiralty Courts were powerless to afford any relief?

The fact that the collision in the case at bar occurred within the territorial limits of the City of New York does not affect the question. The *Linda Park* at the time was engaged in foreign commerce. She was run into while on navigable waters within the admiralty jurisdiction. A city or town has no logical attribute of irresponsibility. It is liable for the usual consequence of ownership, and this liability may be enforced by the courts.

How can the position be sustained that the corporate owner of a steam vessel, if navigated contrary to law, is exempt from liability? Surely if the State of New York can exempt a municipal shipowner, it could also exempt any private corporation, and could thus authorize a species of irresponsible vessel ownership, which in other countries is jealously limited to the public armed vessels of foreign sovereignties.

V.—The doctrine of municipal irresponsibility has grown up under the common law, and local statutes.

Even in common law actions, this Court has declared and uniformly held to a stricter rule of liability than the courts of the State of New York. It has also held firmly to the principle that every ship-owner should so use his property as not injure another. The admiralty law of this Court is "Fault creates liability." If the only redress is a suit *in personam*, then the owner must respond to the value of his *res*.

Suppose the offending vessels were actually seized under judicial process, the *China* case is a direct authority deciding that the liability of the owner does not depend on agency, or the relation of master and servant, but is a responsibility incidental to ownership.

Obviously this liability does not turn on the form of process. The proceeding *in rem* does not create the liability, but is only a convenient mode of obtaining security.

It would lead to strange and unjust results to hold that it was necessary to have a seizure *in rem*, in order to recover damages for collision. Suppose for example that the delinquent vessel escapes from the jurisdiction without actual arrest, could it then be maintained that the maritime liability of the owner was thereby displaced, and that a recovery could only be had against the owner under the common law rules of agency, which would result in his escaping liability unless he actually appointed the pilot?

VI.—Just as this Court has enforced contract obligations of municipalities and preserved the credit of our bonded debts, so it is now called on to protect our maritime commerce. Fortunately the city, as a corporation, has no immunity from suit. Either its vessels must be themselves answerable for the wrongs they do, or the corporate owner must respond, like any other ship proprietor, for the damage done by his floating property.

To deny any remedy for collision is to put our ports behind the civilizations of the smallest Continental States and to acknowledge that our laws are unfit to administer justice to innocent sufferers.

VII.—The decree of the Circuit Court of Appeals should be reversed in so far as it relates to the Mayor, Aldermen and Commonalty of the City of New York, and the cause remanded, with a direction to enter a decree for the libellant against the Mayor, etc., as well as against James A. Gallagher, for the amount found due by the District Court, with interest and costs of the Circuit Court of Appeals and of this Court.

April, 1897.

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Counsel for Libellant.

Appendix.

A.

LIST OF MUNICIPAL FIRE BOATS IN THE UNITED STATES.

From a paper by H. De B. PARSONS, Esq., read before the Society of Naval Architects and Marine Engineers, Nov. 12th, 1896. Transactions, Vol. IV., p. 52.

Name.	Owner.	Year built.	Material	Length over all.	Beam.
				ft. ins.	ft. ins.
William F. Havemeyer	New York	1875	Wood.	106 0	22 0
William S. Stokley	Philadelphia	1875	Steel.	96 0	17 0
Samuel G. King	Philadelphia	1881	Steel.	80 0	18 0
Zophar Mills	New York	1882	Steel.	125 0	25 0
Chicago	Chicago	1883	Wood.	90 0	18 0
Visitor	Philadelphia	1883	Steel.	75 0	15 0
Seth Low	Brooklyn	1886	Wood.	99 0	23 0
Geyser	Chicago	1886	Wood.	109 0	24 0
George R. Potter	Buffalo	1886	Steel.	80 0	20 0
Yosemite	Chicago	1889	Wood.	109 0	24 0
Number 31	Boston	1889	Wood.	108 0	24 6
Cataract	Milwaukee	1889	Wood.	106 9	24 6
The New Yorker	New York	1890	Steel.	125 6	26 0
Snoqualmie	Seattle	1890	Wood.	90 0	22 6
Cataract	Baltimore	1891	Wood.	85 0	18 6
Fire Queen	Chicago	1892	Wood.	90 0	16 0
John M. Hutchinson	Buffalo	1892	Steel.	80 0	20 0
David A. Boody	Brooklyn	1892	Wood.	105 0	23 0
Edwin S. Stewart	Philadelphia	1893	Steel.	110 0	23 7
Detroiter	Detroit	1893	Wood.	115 0	25 0
James Foley	Milwaukee	1893	Wood.	107 0	24 0
John H. Farley	Cleveland	1894	Steel.	90 0	22 0
Clevelander	Cleveland	1894	Wood.	82 0	21 0
Number 44	Boston	1895	Wood.	110 0	26 0

B.

Provisions of the Act consolidating the Charter of the City of New York. Laws of New York, 1882, Chapter 410.

§ 26. The corporation now existing and known by the name of the mayor, aldermen and commonalty of the city of New York, as formed by the consolidation of the county of New York with the body previously known by the name of the mayor, aldermen and commonalty of the city of New York, by the act passed April thirtieth, eighteen hundred and seventy-four, entitled "An act to consolidate the government of the city and county of New York, and further to regulate the same," shall continue to be a body politic and corporate, in fact and in name, by the same name, and have perpetual succession, with all the rights, property, interests, claims, demands, grants, powers and privileges heretofore held by the mayor, aldermen and commonalty of the city of New York, and not modified or repealed by the provisions of this act.

§ 27. For all purposes the local administration and government of the city and county of New York shall continue to be in and be performed by the corporation aforesaid. All charges and liabilities now existing against said county, or which may hereafter arise or accrue in said city and county of New York, and which, but for this act, or the act entitled "An act to consolidate the government of the city and county of New York, and further to regulate the same," passed April thirtieth, eighteen hundred and seventy-four, would be charges against or liabilities of said county, shall be deemed and taken to be charges against or liabilities of said corporation, and shall be defrayed or answered unto by it. All bonds, stocks, contracts and obligations of the said county, and of the board of supervisors which now exist as legal obligations, shall be deemed such of and against the said corporation, and all such that may be authorized or required to be hereafter issued or entered into, shall be issued or entered into by and in the name of the said corporation. Nothing in this section contained shall be construed to affect the election or appointment of county officers whose election or appointment is provided for by the constitution of this state, or any other purposes for which the city and county of New York is recognized in the constitution as one of the counties of this state.

§ 30. The executive power of the corporation shall be vested in the mayor and the officers of the departments.

§ 31. The mayor shall be the chief executive officer of the corporation; he shall be elected at a general state election, and hold his office for the term of two years, commencing at noon on the first day of January next after his election.

§ 34. There shall be the following other departments in said city:
Finance department.
Law department.
Police department.
Department of public works.
Department of public charities and correction.
Fire department.
Health department.
Department of public parks.
Department of taxes and assessments.
Department of docks.
Department of street cleaning.

§ 40. The head of the fire department shall be called the board of fire commissioners. Said board shall consist of three persons, to be known as fire commissioners of the city of New York, who shall, unless sooner removed, respectively hold their offices for six years, and until their successors shall be respectively appointed and have qualified.

§ 123. The finance department shall have control of the fiscal concerns of the corporation. All accounts rendered to or kept in the other departments shall be subject to the inspection and revision of the officers of this department. It shall prescribe the forms of keeping and rendering all city accounts, and, except as herein otherwise provided, the manner in which all salaries shall be drawn, and the mode by which all creditors, officers, and employees of the corporation shall be paid. All payments by or on behalf of the corporation, except as otherwise specially provided, shall be made through the proper disbursing officer of the department of finance, on vouchers to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller, and countersigned by the mayor. The comptroller may require any person presenting for settlement an account or

claim against the corporation to be sworn before him touching such account of claim, and when so sworn, to answer orally as to any facts relative to the justness of such account or claim. Willful false swearing before him is perjury, and punishable as such. He shall settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor; but in adjusting and settling such claims, he shall, as far as practicable, be governed by the rules of law and principles of equity which prevail in courts of justice. The power hereby given to settle and adjust such claims shall not be construed to give such settlement and adjustment the binding effect of a judgment or decree, nor to authorize the comptroller to dispute the amount of any salary established by or under the authority of any officer or department authorized to establish the same, nor to question the due performance of his duties by such officer, except when necessary to prevent fraud. The comptroller shall not reduce the rate of interest upon any taxes or assessments below the amount fixed by law. No contract hereafter made, the expense of the execution of which is not by law or ordinance, in whole or in part, to be paid by assessments upon the property benefited, shall be binding or of any force or effect, unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation applicable thereto, sufficient to pay the estimated expense of executing such contract as certified by the officer making the same. But this provision shall not apply to work done, or supplies furnished, not involving the expenditure of more than one thousand dollars. It shall be the duty of the comptroller to make such indorsement upon every such contract so presented to him, if there remains unapplied and unexpended such amount so specified by the officer making the contract, and to thereafter hold and retain suchsum to pay the expense incurred until the said contract shall be fully performed. And snch indorsement shall be sufficient evidence of such appropriation in any action. The comptroller shall furnish to each head of department, weekly, a statement of the unexpended balances of the appropriation for his department. Wages and salaries, including payments for the board of education, may be paid upon pay-rolls, upon which each person named thereon shall separately receipt for the amount paid to such person, and in every case of payment upon a pay-roll, the warrant for the aggregate amount

of wages and salaries included therein may be made payable to the superintendent, principal, teacher, foreman, or other officer designated for the purpose. The comptroller shall enter into, on behalf of the mayor, aldermen, and commonalty of the city, any lease authorized by the commissioners of the sinking fund of property leased to the city.

§ 193. If a final judgment for a sum of money, or directing the payment of money, shall have been, or shall hereafter be recovered against said city, and the same remains, or shall hereafter remain unpaid, and the execution thereof is not, or shall not be stayed as required by law, or if so stayed, the stay has expired, or shall hereafter expire, it shall be the duty of the board of estimate and apportionment, and the said board is hereby empowered to assess, levy, and cause to be collected at the same time and in like manner as other moneys for the necessary expenses of the city are then next thereafter to be assessed, levied, and collected, and in addition to the moneys now authorized by law to be assessed, levied, and collected for that purpose, a sum of money sufficient to pay the said judgment, with the interest thereupon, and the fees and expenses chargeable by law upon the execution, if any, issued to collect the same. The moneys so assessed and levied as soon as collected and paid to the proper receiving and disbursing officer or officers, or so much thereof as may be necessary, shall, from time to time, be paid by him or them to the judgment creditor, administrator or assignee, or other person entitled to receive the same by reason of the said judgment, without any deduction for his or their fees or commissions. No restriction or limitation imposed by law as to the sum to be raised in any year shall apply to the moneys to be raised for the purposes specified in this section; but the said moneys shall be raised in addition to any sum so restricted or limited.

CHAPTER XI.

The Fire Department.

§ 424. The board of fire commissioners shall possess and exercise, fully and exclusively, all powers, and perform all duties for the government, management, maintenance, and direction of the fire department of the city, and the premises and property thereof. The said department shall have sole and exclusive power and authority to extinguish fires in said city. All real estate, fire apparatus, hose, implements, tools, bells and bell towers, fire telegraph, and all property of whatever nature in use by the firemen or fire department of the city, belonging to said city, shall be in the keeping and custody of the fire department, and for the use of said department. But the said property shall remain the property of the mayor, aldermen and commonalty of the city of New York, subject to the public uses of said department, as aforesaid, and for the purposes provided by this chapter. And whenever any of the said property shall no longer be needed by the said department for the purposes of this chapter they shall surrender the same to the said the mayor, aldermen and commonalty.

§ 425. The said board shall, subject to the other provisions of this act, have full power to provide supplies, horses, tools, implements, and apparatus of any and all kinds (to be used in the extinguishing of fires), and fire telegraphs, to provide suitable locations for the same, and to buy, sell, construct, repair, and have the care of the same, and take any and all such action in the premises as may be reasonably necessary and proper.

§ 426. The board shall possess and exercise full and exclusive power and discretion for the government, management, maintenance, and direction of the several buildings and premises, and bell-towers, and property, and appurtenances thereto, and all apparatus, hose, implements, and tools of any and all kinds which may belong to or be in the use of the said department.

§ 430. The said board of fire commissioners shall, subject to the other provisions of this act, provide such offices and business accommodation as may be requisite for the transaction of the business of the department, and that of its subordinates. The department may adopt a common seal and direct its use.

§ 431. The board of fire commissioners is hereby authorized, empowered, and especially charged with the duties of enforcing the several provisions of this chapter, and may, subject to the other provisions of this act, incur any expense necessary and proper therefor; and said board is hereby authorized and empowered to receive and collect all license fees mentioned in this chapter, and to sue for, and shall have the exclusive right of recovery of, any and all penalties imposed under this chapter, and may sue for and recover and collect the same, with costs, in the manner provided for in actions under the Code of Civil Procedure, and shall apply the same to the uses and purposes of the relief fund of the fire department in the city of New York, and the said board may bring any suit or action for the enforcement of its rights and contracts, and for the protection, possession, and maintenance of the property under the control of said department; and any action to recover any fee, fine, or penalty under this chapter may be brought in any of the district courts in said city; and the attorney to the fire department shall, under the direction of said board, take charge of the prosecution of all suits or proceedings instituted for the recovery and collection of penalties, and the enforcement of the several provisions of this chapter; collect and receive all moneys upon judgments, suits, or proceedings so instituted; pay all costs and disbursements, and discontinue suits and proceedings, and execute satisfaction of judgments upon payment of penalties or costs, and in compliance with orders made in such suits and proceedings; shall keep a correct and accurate register of all suits and proceedings, and account for all moneys received and paid out thereon; and shall pay over to the treasurer of the relief fund the amount of all license fees, penalties, and moneys received and collected by him, and the said board is authorized to settle or compromise any such suit or judgment for less than the amount of the same, in case, in their judgment, they are satisfied that payment of the full amount cannot be collected.

§ 440. The government and discipline of the fire department shall be such as the board may, from time to time, by rules, regulations, and orders prescribe. The board shall have power, in its discretion, on conviction of a member of the force of any legal offense or neglect of duty, or violation of rules, or neglect or disobedience of orders, or incapacity, or absence without leave, or any conduct injurious to the public peace

or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, to punish the offending party, by reprimand, forfeiting and withholding pay for a specified time, or dismissal from the force; but no more than ten days' pay shall be forfeited and withheld for any offense. Officers and members of the uniformed force shall be removable only after written charges shall have been preferred against them, and after the charges have been publicly examined into, upon such reasonable notice to the person charged, and in such manner of examination as the rules and regulations of the Board of Fire Commissioners may prescribe.

§ 441. An intention to reduce the force and expense of the bureau of inspection of buildings, or the clerical force of the department, shall be deemed sufficient ground for the removal of any officer or employee of said bureau, except the chief officer thereof, and of any clerk in the department. The Board of Fire Commissioners is authorized to abolish any office, clerkship or employment in the said bureau of inspection of buildings, and they may consolidate the duties of any two or more officers, clerks or employees thereof.

§ 442. The salary attached to either of the following positions in the fire department shall not exceed the sum here designated as the maximum salary of such position when held by any person appointed to the uniform force of said fire department after May twenty-ninth, eighteen hundred and eighty: For chief of battalion, two thousand dollars; for a foreman, fourteen hundred dollars; for an assistant foreman, thirteen hundred dollars; for an engineer of steamers, twelve hundred dollars; for an assistant engineer of steamers, eleven hundred dollars. The members of the uniform force, appointed after May twenty-ninth, eighteen hundred and eighty, shall, on their appointment, become members of what shall be known as the third grade, at a salary of eight hundred dollars per year; after two years of service in such third grade, they shall, if their conduct and efficiency have been satisfactory, be advanced to what shall be known as the second grade, at a salary of nine hundred dollars per year; after two years' service in such grade, they shall, on like conditions, be advanced to what shall be known as the first grade, at a salary of one thousand dollars per year. But no member of such uniformed force shall be so advanced, as aforesaid, except after examination and approval of his record, efficiency and conduct by the Board of Fire Commissioners.

C.

Decision of the French Court of Cassation, Holding the Commune Liable to a Private Person for Acts of Firemen.

"*Les compagnies de pompiers étant des institutions communales qui fonctionnent sous la surveillance de l'autorité municipale, il en résulte que les mesures prises par les pompiers, pour l'extinction d'un incendie et dans l'ordre de leur service, engagent la responsabilité de la commune à l'égard des particuliers dont les propriétés, placées hors des atteintes du feu, ont subi un dommage par suite de l'exécution de ces mesures* (*c. civ. 545, 1382, 1384; L. 16-24 août 1790. tit. 11, art. 3-5; L. 10 vend. an 4 tit. 4, art. 1 et 2; L. 11 frim. an 7, art. 4; Décr. 29, déc. 1875, art. 3*).

Spécialement, lorsque des pompiers ont brisé la porte d'une propriété pour se procurer l'eau nécessaire à l'alimentation de leurs pompes, la commune est tenue d'indemniser le propriétaire des dégradations ainsi commises.

Et il importe que que ces dégradations aient eu lieu en dehors de toute intervention de l'autorité municipale et par le fait d'un pompier étranger à la compagnie de la commune.

(Commune de Charenton *C.* Gillett.)

Un incendie ayant éclaté, dans la nuit du 23 au 24 janv. 1880, à Charenton, dans l'usine d'un sieur Verstraëte, les pompiers ont, pour chercher de l'eau nécessaire à leurs pompes, brisé la porte charretière d'une propriété voisine appartenant au sieur Gillett. Celui-ci a assigné la commune de Charenton en réparation de ce préjudice, et, le 24 déc. 1881, le tribunal civil de la Seine a condamné celle-ci à lui payer 600 fr. à titre de dommages-intérêts.

* * * * *

Arrêt

La Cour: Sur le moyen unique, tiré de la violation ou fausse application des art. 10, 11 et 30 de la loi du 18 juill. 1837, 5 et 21 du décret du 29 déc. 1875, art. 3, § 5, tit. 11, de la loi du 16-24 aout 1790, 1 et 2 du tit. 4 de la loi du 10 vend. an 4, 1382 et 1384 c, civ.: Attendu que le

jugement attaqué déclare, en fait, que, dans la nuit du 23 au 24 janv. 1880, un incendie s'est déclaré à Charenton, dans l'usine du sieur Verstraëte, et que des pompiers régulièrement appelés ont, dans le but de chercher l'eau nécessaire pour alimenter les pompes, brisé la porte charretière d'une propriété voisine, appartenant au sieur Gillett. Attendu qu'il résulte des dispositions combinées du décret du 29 déc. 1875 que les compagnies de sapeurs-pompiers sont des institutions essentiellement communales ; qu'elles relèvent du ministere de l'intérieur et fonctionnent sous la surveillance de l'autorité municipale. Qu'elles ont pour mission, en se prêtant un mutuel concours, de défendre les personnes et les propriétés contre les ravages de l'incendie;—Que, par suite, lorsque ces compagnies se réunissent sur un point menacé, afin d'y organiser les secours réclamés par les habitants, les individus qui les composent, soit qu'ils résident dans la localité, soit qu'ils y aient été momentanément appelés, agissent, dans l'ordre de leur service, comme représentants ou agents de la commune qui les emploie;—Attendu que, dans l'état des faits constatés par le jugement attaqué les juges du fond ont, à bon droit, considéré la commune de Charenton comme obligée envers Gillett à concurrence du dommage résultant pour lui d'une mesure exécutée en vue de la conservation de tous, et qu'en prononçant contre ladite commune la condamnation visée au pourvoi, le tribunal civil de la Seine, loin de violer aucune loi, a fait une saine application du principe écrit dans l'art. 545 c. civ. ;—Par ces motifs, rejette.

Du 3 janv. 1883—Ch. req.—MM. Bédarrides, pr.-Alméras Latour, rap.—Chévrier, av. gén. c. conf.—Choppard, av."

Dalloz, Jurisp. Générale, year 1883, Part 1, p. 211.